

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

**MICHAEL JONES v. STATE OF TENNESSEE**

**Appeal from the Circuit Court for Marshall County**  
**No. 07CR150 & 17781 Robert G. Crigler, Judge**

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**No. M2008-00194-CCA-R3-PC - Filed November 5, 2008**

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This matter is before the Court upon the State's motion to dismiss or in the alternative to affirm the judgment of the trial court by memorandum opinion pursuant to Rule 20, Rules of the Court of Criminal Appeals. Petitioner, Michael Jones, has appealed the post-conviction court's order dismissing his petition for post-conviction relief in which Petitioner alleged that the enhancement of his sentence violated the Sixth Amendment to the United State's constitution as interpreted in *Blakely v. Washington*, 542 U.S. 296 (2004), *Cunningham v. California*, 549 U.S. 270 (2007), and *State v. Gomez*, 239 S.W.3d 733 (Tenn. 2007), because the trial court relied upon sentencing enhancement factors not found by a jury. Upon a review of the record in this case, we are persuaded that the post-conviction court was correct in dismissing the petition for post-conviction relief and that this case meets the criteria for affirmance pursuant to Rule 20, Rules of the Court of Criminal Appeals. Accordingly, the State's motion is granted, and the judgment of the trial court is affirmed.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Trial Court is Affirmed.**

JERRY L. SMITH, J., delivered the opinion of the court, in which DAVID H. WELLES, and ROBERT W. WEDEMEYER, JJ., joined.

Emeteria R. Hernando, Lewisburg, Tennessee, for the appellant, Michael Jones..

Robert E. Cooper Jr., Attorney General & Reporter; Deshea Dulane, Assistant Attorney General, for the appellee, State of Tennessee.

**MEMORANDUM OPINION**

Petitioner was indicted for aggravated robbery in August of 2003 by the Marshall County Grand Jury. After a jury trial, Petitioner was convicted as charged and sentenced to thirty years as a career offender. *State v. Michael Antonio Jones*, No. M2004-00456-CCA-R3-CD, 2005 WL 544720, at \*1 (Tenn. Crim. App., at Knoxville, Mar. 8, 2005), *perm. app. denied*, (Tenn. Aug. 29,

2005). This Court affirmed Petitioner's conviction and sentence on appeal. *Id.* at \*5. The Tennessee Supreme Court denied permission to appeal on August 29, 2005.

Subsequently, on October 24, 2007, Petitioner filed a petition for post-conviction relief in which he claimed that his sentence was unconstitutional. Specifically, Petitioner claimed that the enhancement of his sentence violated the Sixth Amendment to the United State's constitution as interpreted in *Blakely v. Washington*, 542 U.S. 296 (2004), *Cunningham v. California*, 549 U.S. 270 (2007), and *State v. Gomez*, 239 S.W.3d 733 (Tenn. 2007), because the trial court relied upon sentencing enhancement factors not found by a jury.

On January 14, 2008, the post-conviction court dismissed the petition after determining that it was barred by the statute of limitations. The post-conviction court entered a second order on April 16, 2008, setting out the relevant dates as required by Tennessee Code Annotated section 40-30-106(b). Petitioner appealed to this Court and counsel was appointed to represent Petitioner on appeal. On appeal, Petitioner advances the same argument made in his petition for post-conviction relief and does not address the timeliness of his petition.

### *Analysis*

Under the Post-Conviction Procedure Act, a petition for post-conviction relief must be filed within one year of the date of the final action of the highest state appellate court to which an appeal is taken, or if no appeal is taken, within one year of the date on which the judgment became final. T.C.A. § 40-30-202(a). Unless one of the enumerated exceptions applies, a court does not have jurisdiction to consider an untimely petition. *See* T.C.A. § 40-30-202(b). In the present case, the post-conviction petition was filed more than two years after out state supreme court denied permission to appeal and thus well outside the statute of limitations. The post-conviction court properly held that Petitioner failed to show that one of the exceptions to the one-year deadline listed in the statute was applicable.

Moreover, Petitioner's claim that the post-conviction court erred by not appointing counsel prior to dismissing the petition has no merit. Tennessee Code Annotated section 40-30-106(b) provides that if it is plainly apparent from the face of the petition for post-conviction relief that the petition was not filed within the time set forth in the statute of limitations, the trial court "shall" enter an order dismissing the petition.

### *Conclusion*

The post-conviction court was correct in dismissing the petition for post-conviction relief. The petition was filed outside the statute of limitations, and Petitioner has not shown sufficient reason to toll the statute.

Rule 20, Rules of the Court of Criminal Appeals provides inter alia:

The Court, with the concurrence of all judges participating in the case, when an opinion would have no precedential value, may affirm the judgment or action of the trial court by memorandum opinion rather than by formal opinion, when:

The judgment is rendered or the action taken in a proceeding before the trial judge without a jury, and such judgment or action is not a determination of guilt, and the evidence does not preponderate against the finding of the trial judge . . . .

We determine that this case meets the criteria of the above-quoted rule and, therefore, we grant the State's motion filed under Rule 20. We affirm the judgment of the post-conviction court.

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JERRY L. SMITH, JUDGE